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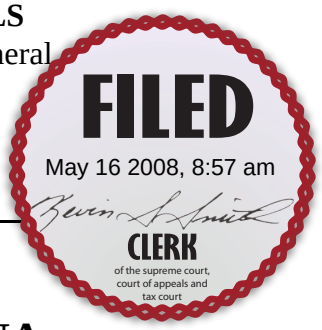

IN THE COURT OF APPEALS OF INDIANA

STEPHEN W. SCHMIDT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0710-CR-570
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause No. 29D04-0512-CM-7553

May 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Following his conviction for class C misdemeanor operating a vehicle while intoxicated ("OWI"), Stephen W. Schmidt challenges the sufficiency of the evidence establishing venue. We affirm.

On the evening of November 25, 2005, Schmidt, his friend, and his nephew dined at a restaurant near Geist Reservoir.[1] At dinner, Schmidt drank at least three beers. Schmidt and his friend left the restaurant in Schmidt's Cadillac. Schmidt drove "southwest" on Fall Creek Road. Tr. at 149. Hamilton County Sheriff's Deputy Greg Lockhart clocked Schmidt's Cadillac traveling fifty-one miles per hour in a thirty-five-miles-per-hour zone and followed Schmidt.

According to Deputy Lockhart, he and Schmidt traveled "technically westbound on Fall Creek Road because it starts to parallel with 96th Street as you get into Marion County." *Id*. at 85. Deputy Lockhart noticed that Schmidt "slowed down for the intersection of 96th and Fall Creek. But he didn't stop." *Id*. Deputy Lockhart stopped Schmidt for speeding and failure to stop "[j]ust inside Marion County." *Id*. at 86. Schmidt had bloodshot eyes, and a strong odor of alcohol emanated from his vehicle. Deputy Lockhart asked Schmidt to exit his vehicle and perform field sobriety tests, which he failed. Deputy Lockhart transported Schmidt to the Fishers Police Department and administered a certified breath test, which indicated that Schmidt had a blood alcohol content of .08.

The State charged Schmidt with Count I, OWI endangering a person, a class A misdemeanor, and Count II, operating a vehicle with an alcohol concentration of .08 or more,

[1] No evidence was presented regarding either the municipality or the county in which the restaurant was located.

a class C misdemeanor. On June 28, 2007, Schmidt's jury trial commenced in Hamilton Superior Court. Deputy Lockhart testified that "Fall Creek is probably the number one place to look for DUIs. Personally *in this county* and 96th Street." *Id*. at 115 (emphasis added). At the close of the State's evidence, Schmidt moved to dismiss for failure to prove venue. The trial court took the motion under advisement. The jury found Schmidt guilty of class C misdemeanor OWI as a lesser-included offense of Count I and found him guilty of Count II. On June 29, 2007, the trial court denied Schmidt's motion to dismiss. The court entered judgment of conviction and sentenced Schmidt on Count I.

On appeal, Schmidt renews his argument that the State failed to prove venue, i.e., that he committed OWI in Hamilton County. Our supreme court has explained that

> [p]roper venue must be proven by the State in the same manner as the essential elements of the crimes as defined by statute, but only by a preponderance of the evidence. Proof of venue is required because the defendant has a constitutional right to be tried in the county in which the crime was committed. Ind. Const., Art. 1, § 13; Ind. Code § 35-32-2-1. A claim on appeal that evidence was insufficient to prove venue must be treated in the same manner as other claims of insufficient evidence. Every intendment will be made in favor of the trial court on this issue. Circumstantial evidence is no different than other evidence for purposes of venue and may be sufficient standing alone.

Campbell v. State, 500 N.E.2d 174, 178 (Ind. 1986) (some citations omitted). "[V]enue need not be proven by the prosecuting witness alone, but may be proved from all the evidence." *Perry v. State*, 255 Ind. 623, 630, 266 N.E.2d 4, 8 (1971). "[I]f the facts and circumstances are of a character to permit the jury to infer that the crime occurred in a given county, such a

finding will not be disturbed on appeal." *Sizemore v. State*, 272 Ind. 26, 32, 395 N.E.2d 783, 787 (1979).

Schmidt contends that

> there was insufficient information which would allow the jury in [this] case to infer that the acts discussed took place in Hamilton County, Indiana. To the contrary, the only Indiana County stated by name during the trial was Marion County. The only time any reference to Hamilton County was made was when Deputy Lockhart was asked for an example of where there are good places to fish for DUIs, he stated, Fall Creek in this county and 96th Street.

Appellant's Br. at 11-12 (citation to appendix omitted).

Viewed most favorably to the trial court's ruling on Schmidt's motion to dismiss, Deputy Lockhart's comment, in combination with other circumstantial evidence, is sufficient to establish by a preponderance of the evidence that Schmidt committed OWI in Hamilton County. Schmidt admitted drinking at least three beers at the restaurant and testified that when he left the restaurant, he drove southwest on Fall Creek Road, where Hamilton County Sheriff's Deputy Lockhart observed him driving over the speed limit. According to Deputy Lockhart, he followed Schmidt's vehicle westbound on Fall Creek Road, which "starts to parallel with 96th Street *as you get into* Marion County." Tr. at 85 (emphasis added).[2] Taken together with Deputy Lockhart's statement in the preceding paragraph, this testimony supports a reasonable inference that the vehicles were in "this county," i.e., Hamilton County, and not yet in Marion County. Deputy Lockhart testified that Schmidt failed to come to a complete stop *at the intersection of* Fall Creek Road and 96th Street, which

indicates that the two roads no longer ran parallel at that point, and that he stopped Schmidt's vehicle "[j]ust inside Marion County." *Id*. at 86. The foregoing testimony is sufficient to establish that Schmidt committed OWI in Hamilton County. Therefore, we affirm his conviction.[3]

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[2] The State claims that "[i]f an offense is committed on a public highway that runs along a common boundary shared by two or more counties, the trial may be held in any county sharing the boundary." Appellee's Br. at 4 (citing Ind. Code § 35-32-2-1(i)). No evidence was presented at trial that either Fall Creek Road or 96th Street is a public highway that runs along a common boundary shared by Hamilton and Marion Counties.

[3] In its order denying the motion to dismiss, the trial court quoted Schmidt's counsel's remark in his opening statement that Schmidt "was stopped just south of 'the county line, in Marion County.'" Appellant's App. at 6. The trial court then stated, "An admission of fact in opening statement constitutes a judicial admission that binds the client." *Id*. (citing *Parker v. State*, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997)). We note, however, that *Parker* involved the revocation of the appellant's probation, which "is not a criminal proceeding, but a civil one, and a probationer is not entitled to the full panoply of constitutional rights afforded a criminal defendant[.]" 676 N.E.2d at 1086. The *Parker* court relied on these salient facts in following "[t]he general rule that a client is bound by his attorney's actions in civil proceedings." *Id*. (citing *Lystarczyk v. Smits*, 435 N.E.2d 1011, 1014 n.5 (Ind. Ct. App. 1982)). With respect to criminal proceedings such as Schmidt's, however, this Court has stated,

> An admission must be an intentional act of waiver--not merely assertion or concession made for some independent purpose. 9 J. WIGMORE, A TREATISE ON EVIDENCE § 2594 (3d ed. 1940). Improvident or erroneous statements or admissions resulting from unguarded expressions or mistake or mere casual remarks, statements or conversations are not generally treated as judicial admissions presented for the purpose of dispensing with testimony or facilitating the trial. 7 C.J.S. ATTORNEY AND CLIENT § 100 (1937).
>
> As the Court pointed out in *State v. Thomas* (1932), 136 Kan. 400, 405, 15 P.2d 723, 725-26, it is particularly important in a criminal case that the defendant be protected from inadvertent slips of the tongue of his attorney:
>
> > Of course counsel for the defendant in a criminal case may, in the course of the proceedings, make an admission of fact voluntarily and purposely to avoid the necessity of proving it, and the court has a perfect right to accept such as an admitted fact for which no proof will be necessary. Such admission, however, is properly made to the court and a record is made of it as such. Then the court conveys to the jury such admission, through its instructions, and it becomes a judicial admission.
> >
> > "The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause; but, to this end, *they must be distinct and formal*, or such as are termed solemn admissions, *made for the express purpose of alleviating the stringency of some rule* of practice, or of dispensing with the formal proof of some fact at the trial. * * * " (1 Greenleaf on Evidence, 16th Ed. 311.)

Affirmed.

BARNES, J., and BRADFORD, J., concur.

> In criminal cases, more particularly than in civil, the defendant is protected against any and every statement of his counsel which is not definitely and purposely intended as and for an admission. (Emphasis supplied.)

Collins v. State, 174 Ind. App. 116, 120-21, 366 N.E.2d 229, 232 (1977). In this case, notwithstanding his expression of skepticism regarding venue during voir dire, Schmidt's counsel made admissions against his client's interest in his opening statement. *See* Tr. at 76-77 (stating that Schmidt left the restaurant and drove toward his home "in Marion County …. just south of 96th Street [which] is the county line[.]"); *id*. at 77 (stating that Deputy Lockhart stopped Schmidt "just south of the county line, in Marion County."). Because neither party has specifically addressed this issue on appeal, and out of an abundance of caution, we have not relied on these admissions in our analysis.